BRIEF AND ARGUMENT IN SUPPORT OF PETITION.

I.

BRIEF.

(1) There is no official report of the opinions delivered in the courts below. As we have noted in the petition, the Circuit Court of Appeals refused to render an opinion or to state the grounds for its decision (R. 50).

(2) As we have pointed out in the petition proper, this Court's jurisdiction is invoked on the ground that there are special and important reasons for a review of the decision in that it turns on an interpretation of the new Federal Rules of Civil Procedure which never before has been passed upon. The effect of the decision in the case at bar is to enlarge the jurisdiction of the courts through a repeal by implication of the Judicial Code. It is held that such repeal was accomplished by a conflict of the Code with the new Federal Rules of Civil Procedure. Thus, the Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. Also, as we will demonstrate in our argument, the judgment complained of decides a federal question probably in conflict with applicable decisions of this Court, and is in conflict with other Circuit Courts of Appeals on the same matter.

(3) The litigation out of which this appeal arose was a suit for damages occasioned by malicious prosecution, abuse of process, false arrest and imprisonment, and

civil conspiracy (R. 33). October 19, 1942, the jury returned a verdict for plaintiff, the petitioner here, and on November 20, 1942, after motions for a new trial and in arrest were overruled, judgment was entered on the verdict (R. 2). On February 5, 1943, seventy-seven days after entry of the judgment, certain of the defendants, the respondents here, filed their notice of appeal in the District Court (R. 3), and moved that court for the issuance of a writ of *supersedeas* (R. 10). The trial judge denied respondents' application for a *supersedeas* for the reason that their appeal had not been perfected within the sixty day period provided for by statute and that, therefore, the court had lost jurisdiction to grant the writ (R. 12, 17). From this order respondents prayed and were allowed an appeal (R. 12). On appeal respondents renewed their application for a *supersedeas* (R. 23), and on February 15, 1943, the Circuit Court of Appeals overruled the District Court and ordered that the writ of *supersedeas* should issue staying enforcement of petitioner's judgment (R. 42). Thereafter, petitioner requested the Circuit Court of Appeals to state the grounds for its decision (R. 47), which was refused (R. 50). Review of the judgment of the Circuit Court of Appeals granting a *supersedeas* is sought by this petition.

(4) The principal errors urged for reversal are: (a) that promulgation of the new Federal Rules of Civil Procedure did not and could not enlarge the jurisdiction of either the District Courts or the Circuit Courts of Appeals, and, therefore, that in the case at bar the District Court was correct in its ruling that it lacked jurisdiction to issue the writ of *supersedeas*, and that the Circuit Court of Appeals under the Judicial Code did not have the power it exercised to grant the writ; and (b) that section 874, U. S. C., Title 28, has not been repealed by implica-

tion, or otherwise, and is still in full force and effect, and that by such provision of the Judicial Code jurisdiction of any court to issue writs of *supersedeas* is limited to those appeals which are perfected within sixty days from judgment.

II.

ARGUMENT.

Summary:

Enactment of the new Federal Rules of Civil Procedure cannot repeal provisions of the Judicial Code fixing limits of the courts' jurisdiction.

May It Please The Court:

The trial court held in the case at bar that under section 874 of the Judicial Code (U. S. C., Title 28), its jurisdiction to issue the writ of *supersedeas* had been lost when the respondents failed to perfect their appeal within the sixty day period fixed by such statute. Upon appeal, respondents urged that section 874 of the Code was in conflict with paragraph 62(d) of the new Federal Rules of Civil Procedure, and that, therefore, under the act of Congress authorizing this Court to promulgate the new rules of procedure and declaring all laws in conflict with such rules "of no further force or effect" (U. S. C., Title 28, sec. 723b), the Rules overrode the Statute and section 874 of the Code thereby had been repealed. The Circuit Court of Appeals sustained the contentions of respondents and overruled the trial court, ordering that the writ of *supersedeas* should issue staying enforcement and collection of petitioner's judgment.

That section 874 of the Judicial Code prescribes limitations upon the jurisdiction of the federal courts to issue

writs of *supersedeas* is not open to serious dispute. The pertinent portions of the statute in question are as follows (28 U. S. C., sec. 874):

> "In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error . . . within sixty days, Sundays exclusive, after the rendering of the judgment complained of. . . ."

All distinctions between writs of error and appeals long since were destroyed by Congress (28 U. S. C., sec. 861a, sec. 861b):

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "The statutes regulating the right to a writ of error defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, *supersedeas*, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

This Court in the early case of *Kitchen* v. *Randolph*, 93 U. S. 86, discussed at some length the precise questions presented here. Its holding that perfection of an appeal within the statutory period of sixty days is a jurisdictional prerequisite to issuance of the writ of *supersedeas* never has been overruled. The language of the *Kitchen case* having application is as follows (p. 92):

> "The only question presented by this motion is as to the power of a justice of this court to allow a *supersedeas* in cases where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of. . . .

> "Service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a *supersedeas*, and it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree if this has not been done.
>
> "The appeal was taken in this case after the expiration of sixty days, and the motion to vacate the *supersedeas* must for that reason be granted."

At the same term, this Court decided *Sage* v. *Central R. R. Co.*, 93 U. S. 412, to the same effect, in which even stronger language was employed, from which we quote (p. 417):

> "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. *If a delay beyond the limited time occurs, the right to the remedy is gone,* and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law."

Subsequent to these decisions of this Court, certain of the Circuit Courts of Appeals had occasion to decide similar questions. In *New England R. Co.* v. *Hyde,* 101 F. 397, the Circuit Court of Appeals ruled that neither a district court, nor a judge thereof, has the power to allow a *supersedeas* pending a review of its judgment after the expiration of sixty days from the date of such judgment. Further, it held that a circuit court of appeals cannot, as an

exercise of its general powers, allow a *supersedeas* where an appellant has failed to bring himself within the provisions of the statute by filing his notice of appeal within sixty days from the entry of the judgment complained of.

A similar decision was reached in *Robinson* v. *Furber*, 189 F. 918, where the Circuit Court of Appeals held (p. 920):

> "This is a petition for a writ of *supersedeas* . . . It appears from the petition that no writ of error was applied for . . . within 60 days after rendition of the judgment . . . (Citing cases.)
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> "The rule established by these cases, when accurately stated, is therefore no more than that to give a justice or judge of the appellate court authority to grant a *supersedeas* after the expiration of the 60 days, a writ of error must have been issued and served, or an appeal allowed within that time.
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> "That is, a writ of error must have been issued and served in cases where a writ of error is applicable, or an appeal taken in cases where appeal is the remedy; and in either case, the limit is 60 days to secure *supersedeas*. In *Peugh* v. *Davis*, the appeal was taken in time—in 60 days—and the justice subsequently allowed bond to be given and granted the *supersedeas* In the instant case, a writ of error is the appropriate remedy to review the judgment, and 60 days have elapsed without its issuance and service. Under the circumstances, a judge of an appellate court has no power to grant a *supersedeas*. . . . The petition for a *supersedeas* is denied."

But respondents urged, and the Circuit Court of Appeals sustained them in such contention, that even though section 874 is a jurisdictional limitation on the power of the courts to issue writs of *supersedeas*, section 62(d) of the New Rules conflicts with the Code and, that, there-

fore, the statute has been repealed. Respondents' contention that the Rules override the Code is bottomed upon the Act of Congress authorizing promulgation of the Rules (Title 28, sec. 723b), which provides:

> "All laws in conflict (with the Rules) shall be of no further force or effect."

Our position is that if section 62(d) of the Rules actually conflicts with section 874 of the Code, such Rule transcends the authority given to this Court in that behalf and for that reason must fall. It is clear that the act of June 19, 1934, empowering enactment of the Rules was expressly limited to matters of practice and procedure. It is equally plain that the provision of the code limiting writs of *supersedeas* to appeals which are perfected within sixty days is a matter of jurisdiction. It cannot be seriously argued Congress contemplated that this Court by its Rules could alter jurisdictional limitations, and extended citations of authority upon the point is unwarranted. However, we wish to refer your Honors to a recent expression of this Court upon the general subject (*Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 10):

> "The Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction . . . There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in this Act: for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute. (Citing *Hudson* v. *Parker*, 156 U. S. 277, 284; *Venner* v. *Great Northern Ry. Co.*, 208 U. S. 24, 35; *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18; *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 434.)"

CONCLUSION.

We are mindful of the usual reluctance of this Court to review questions which do not finally dispose of litigation. However, the right impaired by this decision is substantial. Indeed, this Court said in *Sage* v. *Central R. R. Co.*, 93 U. S. 412, 417, that the right to hold our judgment free of a writ staying its collection or enforcement is a right of which we "cannot be deprived without due process of law."

It is a novel question, and it is bound to vex court and counsel until settled by decision of this Court. And when it is realized that the point by its very nature cannot be presented upon an appeal from the final adjudication of a cause, we are confident that the Court will relax its attitude in this case toward review of a non-final judgment.

We respectfully submit that the question presented is an important point of federal law which should be settled by this Court, and that the disposition of this question below by the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals on the same matter, and is, therefore, of that character which should be reviewed, and that upon review the judgment below should be reversed.

Respectfully submitted,

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